Supreme Court, U.S.
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No. 92-1608

In The

Supreme Court of the United States

October Term, 1992

LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN,

Petitioners,

v.

CITY OF FRANKLIN, J.C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC. and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent City of Franklin ("Franklin") objects to the form and substance of questions 1, 2, 3 and 6 of the "Questions Presented" on p.i of the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition") and believes the questions should be stated as follows:

1. Did the Seventh Circuit err in not concluding that the United States District Court for the Eastern District of Wisconsin abused its discretion in dismissing the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and not subjecting the matter to disposition as provided in Rule 56?

2. Did the Seventh Circuit err in not concluding that the United States District Court for the Eastern District of Wisconsin abused its discretion in its *sua sponte* dismissal of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure?

3. Has the Seventh Circuit rendered a decision in conflict with any decision of the Second Circuit Court of Appeals pertaining to a theory of municipal liability upon a deliberate indifference to constitutional rights?

6. Did the Seventh Circuit err in granting a motion to strike additional evidence submitted by petitioners shortly before oral argument on appeal?

PARTIES

Franklin does not object to the names of all parties as they appear in the caption of this case.

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JURISDICTIONAL STATEMENT

Franklin does not object to the jurisdiction of this Court under 28 U.S.C. §1254(1), but does note that the Statement of the Case set forth in the Petition does not show the basis for federal jurisdiction in the court of first instance and further notes that the district court found a lack of complete diversity. (App. B at 8)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Franklin objects to the Statement of Constitutional and Statutory Provisions Involved (Petition at 2), in that the federal statues and constitutional provisions set forth therein are not addressed in nor related to the Questions Presented or the arguments set forth in the Petition. Further, the statement of Constitutional and Statutory Provisions Involved does not set forth the federal statutes and rules attempted to be applied in the Questions Presented.

The statutes and rules involved in this case are as follows:

Rule 12(b)(6) of the Federal Rules of Civil Procedure

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . A motion

making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for the summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 28(j) of the Federal Rules of Appellate Procedure

(j) **Citation of Supplemental Authorities.** When pertinent and significant authorities come to the attention of a party after the party's brief has been filed or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

———♦———

STATEMENT OF THE CASE

Franklin objects to the Statement of the Case at pp. 2-7 of the Petition, upon the grounds that it is not concise as required by Sup. Ct. R. 14(g) and contains "facts" that are not supported by the record. Franklin further objects to the Statement of the Case upon the grounds that it also contains arguments, including arguments which are irrelevant to the considerations governing review on Writ of Certiorari pursuant to Sup. Ct. R. 10.

Franklin objects to the Statement of the Case, in that it contains substantial misstatements of fact and law as follows:

The original action was brought against four defendants, not three defendants. (Petition at 2) The Complaint did not specifically refer to 42 U.S.C. §1985(3). (*Id.* at 3; R.1) The statement that the District Court "reviewed extensive written materials submitted by Waste" is incomplete and misleading. (Petition at 2) The District Court stated that it reviewed "extensive written submissions by Waste Management and the Bowmans' on the motion to dismiss, . . . " (R. 31 at 27) The written submissions of Waste Management consisted of a notice of motion, motion and brief in support and did not include any affidavits or evidentiary materials. (R. 7 and 8)

Franklin objects to the statements at p. 4 of the Petition that: the "Seventh Circuit ignored the factual allegations in the complaint"; the Seventh Circuit failed to note "that the District Court did not convert the Rule 12(b)(6) motion to dismiss to a motion for summary judgment under Rule 56, as required by Rule 12"; and the "petitioners were thereby denied the opportunity to submit

any evidence in support of their claims", and Franklin objects to any inferences of error arising therefrom, as incorrect under the facts, the record and the law.

Franklin objects to the attempt at p. 4 of the Petition to raise a theory of municipal liability upon a deliberate indifference to constitutional rights, as this issue was not raised by petitioners in the courts below. Further, the statement that "Franklin's municipal indifference [sic] is shown in the signed contract between Franklin and Waste", coupled with the arguments attempting to support this statement, constitute *non sequitur.* (*Id.* at 4) The statement that the connection of the Waste Management sewer force main was to occur "through petitioner's land" is factually incorrect. (*Id.* at 4; R. 31 at 30) The conclusions reached at p. 5 of the Petition, upon petitioners' interpretation of a hold harmless provision and its perceived resulting effect upon the intent of the City of Franklin and all courts, are without any basis in fact or at law and are patently absurd.

Franklin is at a loss to determine the intent of the Petition in its discussion of the application of Wisconsin Statutes. (Petition at 5) The discussion notes that such statutes "give sole jurisdiction over the validity of assessments to the local circuit court". However, petitioner's complaint in this action prayed for a "permanent injunction against all Defendants prohibiting any attempt to tax the Plaintiffs' property". (R. 1 at 11) The inference of a "secret assessment" arising from the statement that "the only assessment they or the state circuit court new of" is not supported by the record. (Petition at 5; R. 31 at 29) The statement that "[n]o damages are provided in Wisconsin" is equally incorrect. (R. 31 at 5)

Franklin objects to all of the conclusions and arguments set forth under "The Easement and The Assessment" at pp. 5-6 of the Petition. Specifically and without limitation, Franklin objects to the statement that Franklin "used" the subject easement to "install a private sewer for waste management", as contrary to the facts and the record. (R. 31 at 30) The allegations of a "secret assessment" and the lack of any notice or hearing, are without any basis in fact or the record. (R. 31 at 29) The statement that petitioners were "secretly assessed an additional $51,000.00 for private sewer for Waste's exclusive use along the easement" now adds an additional contradiction to the contradictions already existing within the complaint. (R. 1 at 5 and Exh. 9) To state that "[a]lmost two years after the $51,000.00 sewer was installed on the petitioner's [sic] land, the secret assessment of $51,000.00 was discovered", upon the record in this matter, including those portions of the record cited in support of such statement of p. 5. of the Petition, is fantastic and delusional. The Petition refers to a letter in the record to support its statement that the "mayor admitted that the $51,000.00 assessment was made but deferred." (R. 1 at Exh. 14) The letter does not refer to an assessment against petitioners nor to the easement upon their property.

Franklin finally objects to the arguments set forth in the Statement of the Case at pp. 6-7 of the Petition, pertaining to "[t]wo reports . . . submitted to expand on allegations of conspirancy [sic] deprive petitioners of constitutional rights and property". The arguments are misplaced and misguided. The Seventh Circuit granted a motion to strike this evidence pursuant to Fed. R. App. P. 28(j) and circuit Rule 29(j), which deal only with the

citation of supplemental *authority*. Petitioners attempt to distinguish *Trans-Sterling, Inc. v. Bible*, 804 F. 2d 525 (9th Cir. 1986), in that the submission there consisted of newspaper reports, while the submission here consisted of "official" reports. (Petition at 7) The issue is whether the submission consisted of authority, not the level of trustworthiness or officiality of further evidence. Were a further inquiry into the substance of the submission warranted, it would bar the submission on hearsay and relevancy grounds.

SUMMARY OF ARGUMENT

The Petition should be denied because it presents questions for review upon factual allegations which are patently absurd and unsupported by the record, including the record made by Petitioners, and the questions of law attempted to be placed upon such allegations do not include any important questions of federal law which have not been settled by the lower courts.

INTRODUCTION

Respondent, City of Franklin, by its attorney, Jesse A. Wesolowski, submits the following arguments and authorities in response to the Petition submitted by the Bowmans.

DISCUSSION

The Petition is confusing in its mingling of misstatements of law and misstatements of the record throughout its Statement of the Case and its Reasons for Granting the Writ. Franklin has objected to those misstatements in the Statement of the Case and will respond accordingly to the Reasons for Granting the Writ, in the order presented in the Petition.

I. THE SEVENTH CIRCUIT PROPERLY DISMISSED THE STATE CLAIMS

Petitioners argue that the District Court improperly dismissed the state claims with prejudice, in violation of the general rule that the District Court should relinquish jurisdiction over pendent state claims when all federal claims are dismissed before trial, citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) and *Gaff v. Federal Deposit Ins. Corp.*, 814 F.2d 311, 319 (6 Cir. 1987). (Petition at 8) The Petition is correct in its statement of the general rule. The Petition is lacking in its failure to cite a recognized exception to the general rule. The Seventh Circuit correctly stated the general rule and the recognized exception it applied:

> [g]enerally, when all the federal claims are dismissed before trial, the district court should relinquish jurisdiction over any pendent state claims as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Instead of relinquishing jurisdiction by dismissing without prejudice, however, Judge Stadtmueller made a determination on the merits by dismissing *both* the federal and state

> claims with prejudice. This action represents a recognized exception to the general rule stated above: "[I]f it is absolutely clear that the pendent claim(s) can be decided in only one way, the district judge can and should decide [them], to save the time of the state court." *Martin-Trigona v. Champion Federal Sav. & Loan Ass'n*, 892 F.2d 575, 578 (7th Cir. 1989). (App. A at 10)

This "reason" does not present any special or important substance for consideration by this Court.

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The District Court recognized and followed its procedural obligations in dismissing the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

> With regard to the standard appropriate to a motion to dismiss, I find that the Seventh Circuit's comments in *Gibson v. City of Chicago* at 910 F.2d 1510 at page 1520, Seventh Circuit case from 1990, quoting *Triad Associates v. Chicago Housing Authority*, 892 F.2d 583 at page 586, the Seventh Circuit case from 1989, and I quote, "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." The allegations of the complaint and any reasonable inferences that can be drawn from them must be taken as true, citing *Hishon v. King & Spaulding*, 467 U.S. 69 at page 73, a 1984 U.S. Supreme Court Case.
>
> Dismissal under Rule 12(b)(6) is appropriate "only if the plaintiff has failed to allege any set of facts upon which relief may be granted,"

citing *Yeksigian v. Nappi*, 900 F.2d 101 at page 102, again a Seventh Circuit case from 1990. (R. 31 at 24)

The Petition repeatedly states and specifically at p. 9, that the district court reviewed "extensive written materials submitted by Waste." (R. 31 at 19, 20, 23 and 27) The "written materials submitted by Waste" were its notice of motion and motion to dismiss and supporting brief. No evidence was presented in those documents. Apparently, petitioners argue that the district court's consideration of the applicable law required the implementation of the disposition procedures for summary judgment under Rule 56.

The underlying assumption of petitioners' argument that the motion to dismiss had to be treated as a motion for summary judgment, is that the attempted claims in the complaint would have been supportable if petitioners were entitled to offer evidence to support them. While Waste Management filed a supporting brief consisting of argument and authority, petitioners filed a brief in opposition to the motion to dismiss, with twenty-two exhibits setting forth purported facts annexed to the brief. (R. 8 and 11) Petitioners noted in their brief in opposition to the motion to dismiss that Waste Management's "Motion to Dismiss under FRCP 12(b)(6) is not supported by documents or affidavits" (R. 11 at 2) and "[a]s with rule 56, when the Court interprets an unambiguous written Exhibit, a question of law for the Court alone is presented." (R. 11 at 4) Before the District Court, petitioners argued for a decision upon the Rule 12(b)(6) motion in their favor, because they provided additional evidence while the movants did not. Before this court, petitioners

now argue for a decision in their favor because the district court allegedly considered the materials petitioners asked it to.

In considering the dismissal of a complaint as patently frivolous or malicious, under 28 U.S.C. §1915(d), this Court in *Neitzke v. Williams*, 492 U.S. 319, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989), provided:

> Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilities appellate review of a trial court dismissal by creating a more complete record of the case. . . . According opportunities for responsive pleadings to indigent litigants commensurate to the opportunities accorded similarly situated paying plaintiffs is all the more important because indigent plaintiffs so often proceed pro se and therefore may be less capable of formulating legally competent initial pleadings. [Citations and footnotes omitted]. *Id.* at 330.

While the Seventh Circuit took note of William Bowman's *pro se* status in its consideration of Rule 38 sanctions (App. A at 11), William Bowman is an attorney and plaintiff and has represented the plaintiffs throughout

these proceedings, with additional local counsel in Milwaukee, Wisconsin. (R. 1 at 1, 12; R. 11 at Exh. K; R. 31 at 2) These facts and the presentation and argument of the issues upon the Rule 12(b)(6) motion to dismiss, both in support of and in opposition thereto (R. 8 and 9), clearly met the "similar footing" and level playing field goals discussed in *Nietzke, Id.* at 330.

Petitioners further attempt to argue at p. 10 of the Petition that the complaint adequately states a claim against "all defendants based on the deliberate indifference of Franklin in hiring Zimmermann, who also contracted with Waste, as to the constitutional rights of Franklin's citizens," citing *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992). This theory was not raised in the courts below. Nonetheless, question 3 of the Questions Presented by petitioners queries "[w]hether there is a conflict between the 2nd and 7th Circuit as to municipal indifference to illegality." (Petition at i) *Walker* considered whether a municipality's failure to train or supervise its employees constituted deliberate indifference to the constitutional rights of its citizens, sufficient to subject the municipality to liability under 42 U.S.C. §1983. *Walker* is inapplicable to this case. Further, as the issue was neither raised nor decided below, the simple answer to Petitioners' Question Presented is: "no." Again, the petition has failed to present any important reason for consideration of review by this Court.

III. THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL OF CLAIMS WAS PROPER

Petitioners argue that the *sua sponte* dismissal of their claims was erroneous because it thereby denied petitioners of notice and an opportunity to be heard. (Petition at 10) However, Waste Management moved to dismiss all of the causes of action in the complaint, including both federal and state claims, and filed and served its written argument with authorities in support thereof. (R. 7, 8 and 19) Petitioners responded to the motion with written arguments and twenty-two annexed exhibits, including William Bowman's affidavit. (R. 19) All parties were served with notice of the conference call hearing upon the motion to dismiss. (R. 12 and 18) The petitioners had prior notice and an opportunity to be heard.

The District Court recognized its legal obligations upon its decision to dismiss the complaint upon its own motion against Zimmermann and Franklin at the hearing upon the motion to dismiss.

> Although *sua sponte* dismissals without prior notice and an opportunity to be heard are generally frowned upon, citing *Tamari v. Bache & Company, (Lebanon)* S.A.L., 565 F.2d 1194 at page 1198, Seventh Circuit 1977, *cert. denied* 435 U.S. 905, 1978, the Seventh Circuit has acknowledged and indeed been willing to permit such dismissals "so long as a sufficient basis for the court's action is apparent from the plaintiff's pleading," citing *Doe on Behalf of Doe v. St. Joseph's Hospital,* 788 F.2d 411 at page 414, Seventh Circuit Case from 1986.

> The court's reasoning is that "the proper administration of justice requires that a trial judge have substantial control over the proceedings before him," again citing *Doe*, 788 F.2d at 415, quoting from *Flora v. Home Federal Savings & Loan Association*, 685 F.2d 209 at page 212, again a Seventh Circuit Case from 1982. (R. 31 at 26-27)

Other circuits have approved *sua sponte* dismissals of complaints under Rule 12(b)(6): "where it was apparent that the claimant could not possibly prevail"; "where 'a remand would be futile' "; where the "position of the parties on appeal makes clear that a remand of service of process and further pleading would serve no purpose" and "where the claimant cannot possibly win relief." *Baker v. Director United States Parole Com.* 916 F.2d 725, 726 (App. D.C. 1990). [Citations Omitted] *Baker* also discussed a notice requirement of other circuits, but noted: "[s]uch an approach, however, in cases where the plaintiff has not advanced a shred of a valid claim can only lead to a waste of judicial resources." *Id.* at 726.

> However, it is clear that the court does not have to accept every allegation in the complaint as true in considering its sufficiency. Courts have used varying language to draw the line between what is admitted on the motion and what is not. For example, courts have said that they accept the truth of "facts," "material facts," "well-pleaded facts," and "well-pleaded allegations." They also have said they do not accept "legal conclusions," "unwarranted inferences," "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations." *Wright &*

> *Miller,* Federal Practice and Procedure: Civil 2d §1357, pp. 311-318 [footnotes omitted].

The district court's findings that the causes of action attempted in the complaint constituted indisputably meritless legal theories is evidenced by the statements of the court at the hearing upon the motion to dismiss:

> [I]n my view since the Bowmans have not and, more importantly, cannot allege any racial or class-based discrimination, . . . I conclude that the Bowmans cannot state a claim under any circumstances relating to the factual underpinnings of this case under section 1985. . . . I find it patently absurd for the plaintiffs in this case to suggest that Waste Management somehow conspired with the City . . . I find that argument to be less than ingenuous and find no basis to allow the state trespass claim to go forward. . . . Similarly, there is even less reason for the Court to consider as viable their final claim with regard to their inability to sell the property because of the pendency of a potential assessment as amounting to a claim for relief under state law." (R. 31 at 26, 27, 29 and 31)

The Seventh Circuit provided that the District Court "did not abuse [its] discretion by finding that the Bowman's pendent state claims could be decided in only one way, because the are without merit." (App. A at 11)

"[B]oth Franklin and Zimmermann had filed answers to the complaint, . . . [and] did not dispute the adequacy of the complaint." (Petition at 10) This statement is incorrect. Both Franklin and Zimmermann had answered the complaint with affirmative defenses set forth as available under Rule 12(b)(6), alleging that the complaint failed to

state a claim upon which relief may be granted. (R. 5 and 10) Again, the Petition has failed to Provide any important or special reason for review by this Court and has provided further indicia of petitioners' inability to consistently maintain an intellectually honest argument, under an apparent compulsion to support factual contentions which are clearly baseless.

IV. PETITIONERS' DISCUSSION OF EXCLUSIVE STATE JURISDICTION AND THE EASEMENT AND ASSESSMENT DOES NOT PROVIDE SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT.

The discussion at p. 10 of the Petition as to the jurisdiction of state courts over the appeal of a special assessment is in contradiction to the complaint's prayer for a judgment of "permanent injunction against all Defendants prohibiting any attempt to tax the Plaintiffs' property". (R. 1 at 11) Petitioners' argument that damages "are not granted under state law" is a misstatement of the law. Property owners affected by a special assessment of the Village of Germantown, Wisconsin, contended that the assessment constituted a taking of property and a denial of equal protection in violation of the Wisconsin Constitution and the United States Constitution in *CIT Group v. Village of Germantown*, 163 Wis. 2d 426, 471 N.W.2d 610 (Ct. App. 1991).

> Because the assessments were reasonable and fulfill the statutory requirements for an assessment where a municipality proceeds under its police power, there was no taking of property in violation of the Wisconsin Constitution or the

> United States Constitution. Neither was there a violation of the constitutional equal protection clauses since all future users were similarly treated by the assessment and the assessment had a rational basis. *Id.* at 437, 438.

Petitioners were made aware of this decision at the hearing upon the motion to dismiss before the district court. (R. 31 at 5)

The discussion of the "The Easement and the Assessment" again fails to illuminate what legal theory is intended to support petitioners' state claims. (Petition at 11, 12) The district court found that the petitioners cited no legal authority for their position. (R. 31 at 30) The Seventh Circuit also found that the petitioners cited no authority for "the untenable proposition that waste flowing through a sewer under a person's property constitutes a trespass. Finally, we cannot identify any known claims for relief under Wisconsin law that will support the Bowmans' interference claim." (App A at 11)

William H. Bowman executed an easement for the installation of sewers across the subject property. (R. 1 at 10) "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Harder v. Maloney,* 251 Wis. 233, 238, 26 N.W2d 830 (1947). Petitioners' trespass claim is not available under state law. In an action for trespass against a state highway commission involving lands previously taken for highway purposes, the Wisconsin Supreme Court recognized under those facts that statutory inverse condemnation procedures were the appropriate remedy.

> Since there is a statutory remedy for lands taken for public use in such cases, it is very evident that if the plaintiff's land has in fact been taken for such use, within the meaning of the constitution and the statutes, that he should have pursued that remedy. Certainly an action of tort will not lie against those making such improvement under statutory power. *Grunwald v. Modern Wrecking Co.*, 18 Wis. 211, 215, 118 N.W.2d 188 (1962).

The Petition has not raised any substantive issue upon the Seventh Circuit's findings of the lack of merit and failure to state claims as to each of the four causes of action in the complaint. Other than describing the fourth cause of action in the complaint as an "interference with prospective business relations" theory at p. 3 of the Petition, the Petition presents no question nor argument relative to this attempted state claim and Franklin assumes petitioners have finally agreed with the lower courts and the respondents, that no claim for relief exists by virtue of such allegations.

CONCLUSION

The complaint within its four corners consists of sweeping legal conclusions cast in the form of factual allegations and fails to state a claim upon which relief may be granted. Petitioners' claims are contradictory and based upon outlandish legal theories, ultimately requiring that they be decided in only one way, because they are without merit. The petition has not presented any special or important reason for granting the writ. The

City of Franklin respectfully requests that the Petition for Writ of Certiorari be denied.

Dated this 3rd day of May, 1993.

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